Sim Ah Hee @ Lim Ah Hee & Anor v Affin Bank Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–199 OF 2005 AND W-02–313 OF 2005
TENGKU BAHARUDIN SHAH, ABDULL HAMID EMBONG AND HASAN LAH JJCA
14 APRIL 2010

Contract — Terms — Construction — Letters of indemnity — Terms of letters of indemnity worded identically and clearly — Whether recourse to other documents permissible — Commercial contracts — Principles of construction

At one Jerajat's request, the respondent issued four letters of guarantee ('LGs') to secure payment by Jerajat to Yayasan Pahang ('YP') for the extraction and purchase of timber. The four LGs were secured by four letters of indemnity ('LIs') signed by the appellants whereby they agreed to indemnify the respondent against all losses which the respondent might incur by reason of honouring the payment of the LGs. The appellants failed to make good on the LIs after the respondent had paid all the sums due under the LGs to YP. The respondent thus sued the appellants in the High Court and obtained judgment against them. The appellants appealed contending that they were not liable as the respondent released the money prematurely in breach of the terms specified in the LGs. The appellants thus appealed to the Court of Appeal. The main issue on appeal concerned the construction of the LIs and whether other documents could be resorted to in construing the LIs.

Held, dismissing the appeals with costs:

(1) When the terms of a contract are reduced into a form of document, no evidence shall be given in proof of the terms of the contract except the document itself. When the meaning of a contract is clear there can be no resort to other documents to give another meaning to it. It was not legitimate to use as an aid in the construction of a contract anything which the parties said or did after the contract was made (see para 10); *Union Workshop (Construction) Co v Ng Chew Ho Construction Co Sdn Bhd* [1978] 2 MLJ 22 (FC) followed; *Perwik Sdn Bhd v Lee Yen Kee (M) Sdn Bhd* [1996] 1 MLJ 857 referred.

(2) In the instant case, the terms stipulated in the LIs were identical and very clear. Resort could not be had to other documents to give the terms of the LIs another meaning. In construing the LIs which were commercial contracts, the question to be asked is the meaning of what the parties had said and not what they meant to say. In other words, the

contract had to be read within its four corners. In the instant case, the terms and words of the LGs could not be incorporated as part of the LIs nor alter or vary the terms of the LIs or intention of the parties (see paras 11 & 13–15).

(3) In the event the court was wrong to exclude extrinsic evidence in construing the LIs, the contemporaneous documents but not the affidavits of Abdul Razak — inadmissible under ss 91 and 92 of the Evidence Act 1950. These relevant and contemporaneous documents reflected the true intention of the appellants when issuing the LIs. The fact that the terms of the LGs deviated therefrom did not help the appellants as their intention was further reinforced by the authority given to the respondent to pay out the money to YP without question which negated the terms of the LGs which merely accorded with the sample attachment. Both appellants and respondent were bound by the terms stipulated in the LIs (see paras 18–19).

[Bahasa Malaysia summary

Atas permintaan Jerajat, responden mengeluarkan surat-surat gerenti ('SG') untuk jaminan bayaran oleh Jerajat kepada Yayasan Pahang ('YP') untuk penebangan dan pembelian balak. Keempat-empat SG tersebut dijamin oleh empat surat tanggung rugi ('ST') ditandatangani oleh perayu-perayu di mana mereka bersetuju untuk menanggung rugi responden atas semua kerugian yang mungkin dialami oleh responden disebabkan pembayaran SG. Perayu-perayu gagal menepati ST tersebut setelah responden membayar semua jumlah hutang di bawah SG tersebut kepada YP. Maka responden menyaman perayu-perayu di Mahkamah Tinggi dan memperoleh penghakiman terhadap perayu-perayu. Perayu-perayu merayu dengan menghujahkan bahawa mereka tidak bertanggungan kerana responden telah menyerahkan wang pra matang yang melanggar terma-terma yang khusus dinyatakan dalam ST. Isu utama yang dirayu berkaitan pentafsiran SG dan sama ada dokumen-dokumen lain boleh dirujuk dalam mentafsirkan ST tersebut.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Apabila terma-terma kontrak didokumentasikan, tiada keterangan harus diberikan sebagai bukti bagi terma-terma kontrak tersebut kecuali dokumen itu sendiri. Apabila maksud kontrak adalah jelas, tidak haruslah merujuk kepada dokumen lain untuk memberikannya maksud yang lain. Adalah tidak sah untuk menggunakan apa-apa yang dikatakan atau dibuat oleh pihak-pihak selepas kontrak dibuat sebagai bantuan untuk pentafsiran (lihat perenggan 10); *Union Workshop (Construction) Co v Ng Chew Ho Construction Co Sdn Bhd* [1978] 2 MLJ 22 (MP) diikut; *Perwik Sdn Bhd v Lee Yen Kee (M) Sdn Bhd* [1996] 1 MLJ 857 dirujuk.

(2) Dalam kes ini, terma-terma yang dinyatakan dalam ST adalah serupa dan sangat jelas. Rujukan kepada dokumen-dokumen lain tidaklah perlu untuk memberikan maksud lain kepada terma-terma ST. Dalam mentafsirkan ST yang mana merupakan kontrak komersial, persoalan yang harus ditanya ialah maksud apa yang telah dikatakan oleh pihak-pihak dan bukannya apa yang ingin mereka katakan. Dengan kata lain, kontrak tersebut harus dibaca dalam lingkungan empat penjuru itu sahaja. Dalam kes ini, terma-terma dan perkataan-perkataan SG tidak boleh dimasukkan sebagai sebahagian daripada ST atau meminda atau mengubah terma-terma ST atau niat pihak-pihak (lihat perenggan 11 & 13–15).

(3) Oleh itu mahkamah khilaf apabila tidak memasukkan keterangan di luar kes tersebut dalam mentafsirkan ST, dokumen-dokumen semasa tetapi bukan afidavit-afidavit Abdul Razak — tidak boleh diterima masuk di bawah ss 91 dan 92 Akta Keterangan 1950. Dokumen-dokumen yang berkaitan dan semasa tersebut menunjukkan niat sebenar perayu-perayu apabila mengeluarkan ST. Fakta bahawa terma-terma SG menyimpang tidak membantu perayu-perayu kerana niat mereka disahkan lagi dengan kuasa yang diberikan kepada responden untuk membayar wang kepada YP tanpa soal yang mana menyangkal terma-terma SG yang dipersetujui dengan lampiran contoh. Kedua-dua perayu dan responden terikat dengan terma-terma yang dinyatakan dalam ST (lihat perenggan 18–19).]

Notes

For cases on construction of terms, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5342–5378.

Cases referred to

Kandasami v Mohamed Mustafa [1983] 2 MLJ 85, PC (refd)

Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud [1979] 2 MLJ 29, FC (refd)

Perwik Sdn Bhd v Lee Yen Kee (M) Sdn Bhd [1996] 1 MLJ 857, HC (refd)

Pioneer Shipping Ltd & Ors v BTP Tioxide Ltd [1982] AC 724, HL (refd)

Union Workshop (Construction) Co v Ng Chew Ho Construction Co Sdn Bhd [1978] 2 MLJ 22, FC (folld)

Legislation referred to

Contracts Act 1950 s 77

Evidence Act 1950 ss 91, 92

Rules of the High Court 1980 O 33 r 2

Appeal from: Civil Suit No D2-C23–2336 of 1986 (High Court, Kuala Lumpur)

M Manoharan (M Manoharan & Co) for the appellant in Civil Appeal No W-02–199 of 2005.
M Mura Raju (Mura Raju & Co) for the appellant in Civil Appeal No W-02–313 of 2005.
WM Lee (GC Tan with him) (Shook Lin & Bok) for the respondent.

Tengku Baharudin Shah JCA:

[1] The appellants were sued as partners of a timber trading firm Pembalakan Jerajat ('Jerajat') for breach of contract in respect of four letters of indemnity ('LIs') signed on behalf of Jerajat as security for four letters of guarantee ('LGs') issued by the respondent in favour of Yayasan Pahang ('Yayasan'). They are alleged to have failed to make good on the LIs after the respondent had paid all the sums due under the LGs to Yayasan at its request. The appellants contend that they are not liable as the respondent released the money prematurely in breach of the terms specified in the LGs.

[2] In the court below the parties agreed to settle their dispute under O 33 r 2 of the Rules of the High Court 1980 ('RHC') by seeking the court's determination on a legal issue based on the agreed facts set out and the interpretation of the documents listed. The appellants having conceded that the payment to Yayasan under LG for G001730 for logging area in Block 6B was not contrary to terms, the question posed was whether it was the term of the remaining three LIs and three LGs that payment should only be made by the respondent upon the issuance of a logging licence for each relevant logging area. And if such payments were made as had been done by the respondent whether the appellants are liable to the respondent under the said LIs.

[3] The agreed facts are briefly these. At the request of Jerajat the respondent issued four LGs No G001730 and No G001731 dated 1 August 1984 and No G001735 and No G001736 dated 14 September 1984. The said LGs were to secure payment by Jerajat to Yayasan for the extraction and purchase of timbers from four blocks of logging areas identified as Blocks 6B, 6C, 7B and 7C. All LGs were secured by four LIs signed by the appellants whereby they agreed to indemnify the respondent against all losses which the respondent might incur by reason of honouring the payment of the LGs. The respondent subsequently paid Yayasan at its request the total sum of money guaranteed under the LGs. The appellants however failed to repay the money to the respondent resulting in the filing of this suit.

[4] The learned trial judge with the benefit of written submissions of counsel found the LIs to be valid contracts of indemnity between the parties

within the meaning of s 77 of the Contracts Act 1950. Therein the appellants expressly agreed to indemnify the respondent for all losses sustained for having given the guarantees as consideration of the respondent issuing the LGs. The respondent issued the LGs in accordance with the appellants' request and instructions. The respondent having on its part given sufficient consideration for the appellants' undertaking as specifically agreed in the LIs was entitled to enforce its claim against the appellants under the contract.

[5] The learned judge also found that the appellants having obtained benefits out of the LGs as they had worked the logging areas after logging licences were issued upon release by the respondent of the money to Yayasan on the appellants representation that they would indemnify are estopped from denying their liability to the respondent under the LIs.

[6] Judgment was thus entered against the appellants for the amount claimed (RM44,788,368.03). The counter claims of the appellants were dismissed with costs. Hence these appeals.

[7] We heard both appeals together. The appellants agreed to a joint oral submission by En Mura Raju counsel for the appellant in the second appeal. He submitted that the LIs must be read together with the corresponding LGs which were incorporated therein and form part of the same. By doing so he argued it would be seen that the consideration for the release of the money under the LI is the issue of the logging licence pursuant to the LG, bearing in mind that both LI and LG were made back to back and must be strictly construed as to their terms. He relied on the affidavits of Abdul Razak bin Hussin of the respondent deposed on 19 December 1987 and 28 January 1987 which contain admission of breach by the respondent of the stipulated condition in the LG when releasing the money to Yayasan.

[8] It was thus contended that when the respondent released the money it was in breach of fundamental terms of the LI which went to the root of the contract. It was submitted that the authority to pay under the LI is reconcilable with the term of the LG in that the amount is only payable on logging licence being issued.

[9] It was also submitted that the learned judge went beyond the scope of the reference before her when invoking estoppel to apply because the appellants had derived benefit. It was argued that that was irrelevant.

[10] The law is that when the terms of a contract is reduced into a form of document, no evidence shall be given in proof of the terms of the contract except the document itself (see s 91 of the Evidence Act 1950). The Federal Court in *Union Workshop (Construction) Co v Ng Chew Ho Construction Co*

Sdn Bhd [1978] 2 MLJ 22 held that when the meaning of a contract was clear there could be no resort to other documents to give another meaning to it. And it is trite that it is not legitimate to use as an aid in the construction of a contract anything which the parties said or did after it was made. Otherwise the contract might mean one thing on the day it was signed and something else a month or a year later because of the intervening events (see *Perwik Sdn Bhd v Lee Yen Kee (M) Sdn Bhd* [1996] 1 MLJ 857 at p 862.

[11] The terms stipulated in the LIs are identical and very clear. The relevant terms read as follows:

> *We* hereby *authorise and request you to give a guarantee* to Yayasan... *in term of the letter copy of which is attached* hereto … on our behalf and *in consideration of your so doing we hereby undertake and agree to indemnify you from and against all losses* … which you may incur or sustain by reason or on account of you having given the said guarantee ...
>
> … and *we agree that any request upon you by Yayasan for the payment* of any sum of money in pursuance of the said guarantee *shall be sufficient authority to you for making any such payment* and *it shall not be incumbent upon you to enquire whether any such amount is in fact due*.

(Emphasis added.)

[12] As correctly found by the learned judge the appellants expressly agreed that in consideration of the respondent issuing the guarantees in the form of the LGs, the appellants would indemnify the respondent for all losses sustained for having given the said guarantees. As the respondent had, on the facts, done all that it was required to do under the LIs, which was to issue the LGs on terms determined by the appellants, it is entitled to enforce the undertaking and claim to be indemnified under the contract (LIs). Similarly, there is no ambiguity that the respondent was obliged to pay any sum requested by Yayasan without having to ascertain whether such amount was due. On the fact, that was exactly what the respondent did, it paid Yayasan all the sum guaranteed when they were requested for. The respondent, having performed its part of the bargain, has the right to enforce the appellants' undertaking under the LIs.

[13] With the terms of the LIs so clearly expressed as aforesaid resort cannot be had to other documents to give them another meaning (see *Union Workshop*. LIs are commercial contracts. The principles to be applied in construing such contracts are expressed by Lord Diplock in *Pioneer Shipping Ltd & Ors v BTP Tioxide Ltd* [1982] AC 724, at p 736 (HL) in the following words:

> The object sought to be achieved in construing any commercial contract is to ascertain what were the mutual intentions of the parties as to the legal obligations each assumed by the contractual words on which they ... chose to express them; or, perhaps more accurately, what each would have led the other reasonably to assume were the acts that he was promising to do or to refrain from doing by the words in which the promises on his part were expressed.

[14] In short, the question to be asked is the meaning of what the parties have said and not what they mean to say. In other words, if the contract is reduced into a document it must be read within its four corners. As contended by Puan Lee for the respondent, if you seek to bring in other documents then it must be incorporated and stated to include those documents, which is not the case here.

[15] Mr Mura Raju argued that the LGs were incorporated into the LIs by virtue of the words 'guarantee ... in terms of the letter copy of which is attached hereto', 'by reason or on account of your having given the said guarantee' and 'in pursuance of the said guarantee' found therein'. With respect we disagree. Those words merely refer to the format to be used if the respondent agreed to accede to such authority and request of the appellants. They could in no way incorporate the terms contained therein as part of the LI nor alter or vary the terms of the LI or intention of the parties. That is the natural and only meaning of the words used.

[16] If the inclusion of the attached sample letter of guarantee is to cause any ambiguity or inconsistency in the terms of the LI, then the *contra proferentum rule* must be invoked. The rule, in the words of Lord Brightman in *Kandasami v Mohamed Mustafa* [1983] 2 MLJ 85 (PC) is as follows:

> There is a principle of constructions that if a document inter partes contains an ambiguity which cannot otherwise be satisfactorily resolved, it is to be construed adversely to the party who proffered it for execution.

[17] See also *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29. As the LIs (including the attachment) issued from the appellants who sought the LG from the respondent their terms must be construed in the respondent's favour.

[18] In any event, if we are wrong to exclude extrinsic evidence in construing the LIs, the contemporaneous documents like the letters of offer from Yayasan, the LGs and the ensuing related timber extraction agreement (the agreements) should be of relevance in construing the LIs but not the affidavits of Abdul Razak which were affirmed some three years later. Anyway, the affidavits are not admissible under ss 91 and 92 of the Evidence Act 1950.

The letters of offer in respect of Blocks 6B and 6C must be deemed to be similar to the one dated 4 September 1984 in respect of Blocks 7B and 7C listed in the documents for interpretation. It is addressed to Jerajat notifying it of the success of its tender for the two logging areas at the stated tender prices. The second and third paragraphs of the letter are significant and read:

> Oleh hal yang demikian, tuan dikehendaki datang ke pejabat ini pada bila-bila masa pejabat dalam tempoh dua (2) minggu dari tarikh surat ini untuk menandatangani perjanjian.
>
> Tuan juga diminta membawa bersama-sama 'Bank Guarantee' atau 'Bank Draft' yang sah atas nama Yayasan Pahang sebagaimana jumlah di atas.

[19] Considering that the relevant LIs and LGs are dated 14 September 1984 and the agreement in respect of Blocks 7B and 7C was executed on 30 October 1984, the appellants had duly complied with Yayasan's request by producing the LGs for the tender amounts for the respective logging areas within the time stipulated before execution of the agreements thereafter. This letter is significant to show that Yayasan wanted the appellants to pay the tender price as a pre condition to the execution of the agreement. It was to meet that pre condition that the appellants went to the respondent with the LIs which terms reflect their intention to ensure that the amount tendered was available at Yayasan's disposal, hence the provision allowing the respondent to pay out any sum of money requested by Yayasan without questioning whether the amount is due, as stipulated in the last five lines of the LIs. Such intention is fortified by the provisions of the agreement with cl 2 requiring a lump sum payment of the total tender price, cl 4 providing for forfeiture of deposit and other payments in the event of default, cl 9 putting Yayasan responsible for obtaining the logging licence and cl 11 requiring payment of all sums due to be paid by the appellants before the process of obtaining the logging licence. These relevant and contemporaneous documents reflect the true intention of the appellants when issuing the LIs. The fact that the terms of the LGs deviated therefrom did not help the appellants as their intention is further reinforced by the authority given to the respondent to pay out the money to Yayasan without question which negate the terms of the LGs which merely accord with the sample attachment. Both appellants and respondent are bound by the terms stipulated in the LIs.

[20] On the contention of that the learned judge went beyond the reference, we agree with Puan Lee that she did not. The issue put before the court is wide enough to cover any aspect as to whether the appellants are liable under the LIs on whatever ground. It is clear to us from her grounds of judgment that the learned judge by holding the appellants liable had

answered the legal question posed which must necessarily be in the negative and the affirmative respectively. We found no cause to interfere.

[21] For the reasons aforesaid we unanimously dismissed the appeals with costs and affirmed the decision of the High Court.

Appeals dismissed with costs.

Reported by Andrew Christopher Simon